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1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3
4 INTERNATIONAL LONGSHORE AND)
WAREHOUSE UNION, (ILWU),)
5)
Plaintiff,) 3:12-cr-001058-SI
6)
vs.) January 15, 2019
7)
ICTSI OREGON, Inc., an Oregon) Portland, Oregon
corporation,)
9)
Defendant.)

10

11 (Telephone Conference)

12 TRANSCRIPT OF PROCEEDINGS

13 BEFORE THE HONORABLE MICHAEL H. SIMON

14 UNITED STATES DISTRICT COURT JUDGE

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1 APPEARANCES

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(January 15, 2019)

P R O C E E D I N G S

(Open court:)

4 THE CLERK: This is the time set for a telephone
5 conference in civil case 12-1058-SI, ILWU, et al. versus ICTSI,
6 Oregon Inc.

7 Counsel, there is a court reporter present, so please
8 be sure to state your name before you speak. Here is
9 Judge Simon.

10 THE COURT: Good afternoon, everyone. We are talking
11 about ILWU's motion for reconsideration, Docket 347, and let's
12 just get right into the merits of it. Normally I am concerned
13 when a motion for reconsideration raises arguments that could
14 have but weren't raised in the earlier briefing. But let's
15 just get right into the merits.

16 On the jurisdictional disputes, I see that ICTSI has
17 offered to narrow its request only to seek disputes that
18 resulted in formal complaints, such as an NLRB unfair labor
19 practice charge or a Section 10(k) charge or an AFL-CIO
20 Article XX complaint or a court complaint and obviously looking
21 only from 2008 to the present.

22 It seems in its motion for reconsideration that ILWU
23 has identified between 25 and 50 charges that would fit within
24 this category. Did I understand that correctly? And if so,
25 why isn't that an acceptable narrowing from the perspective of

1 ILWU?

2 Let me ask ILWU first.

3 MR. PURCELL: Thank you your. This is Dan Purcell.
4 You know, the email from Ms. Gamblin yesterday or the day
5 before by which this was set up didn't actually relate to the
6 motion for reconsideration. It related to certain reserved
7 deposition topics in the order on the motion to compel and
8 motion for protective order. And so my understanding was that
9 we were here to talk about those five deposition topics, which
10 were the subject of the email.

11 THE COURT: Is one of those deposition topics related
12 to this jurisdiction dispute issue?

13 MR. PURCELL: It is not. The five deposition topics
14 relate to other issues, and I can go through them one at a
15 time. The jurisdictional dispute issue was a separate topic.
16 That was, I believe, topic seven.

17 THE COURT: Let's deal with the jurisdictional
18 dispute first and then at the end the call we will turn to the
19 other issues.

20 But why isn't that a fair resolution of this motion
21 for reconsideration? Just turn over the formal things that
22 appear to be between 25 and 50 in nature. It looks like what
23 ICTSI is proposing further is that they're just going to ask in
24 an interrogatory that ILWU just simply identify by name and
25 case number the complaint, charge, response, and final

1 judgment. That's far less burdensome than what was
2 originally asked based upon the original request in my read of
3 the motion for reconsideration.

4 But why isn't this a fair compromise?

5 MR. PURCELL: Your Honor, I suppose if we are talking
6 about an interrogatory answer and listing 25 to 50 instances of
7 jurisdictional disputes, that that's something we could do.

8 THE COURT: Okay. And I take it -- am I reading this
9 correct, ICTSI, Ms. Gamblin, that that's acceptable to ICTSI?

10 MS. GAMBLIN: Yes, Your Honor, it is. I would like
11 to just perhaps prevent another call in a week or two. We have
12 the 30(b)(6) depositions of the International scheduled for
13 January 24th in San Francisco, and the topic of jurisdictional
14 disputes in other courts will need to be handled then. To the
15 extent we can get this interrogatory issued and response due
16 and documents produced before then, that would help us a lot.

17 THE COURT: Terrific. And if you can't, though, if
18 they really can't get this together, then you'll just have to
19 leave open and continue that deposition.

20 MS. GAMBLIN: Okay. Thank you, Your Honor.

21 THE COURT: All right.

22 The second item on the motion for reconsideration
23 related to something that I think you've all called
24 "identifying produced documents." What's that dispute all
25 about? It seems, if I'm reading this correctly, that you have

1 got to produce the documents that I identified in our opinion,
2 but now ILWU is saying that that's particularly burdensome. I
3 get that.

4 But was there some reference to the fact that ILWU
5 has already identified some documents that they refuse to share
6 or further disclose? Am I understanding that correctly?

7 MS. GAMBLIN: Would you like me to begin?

8 THE COURT: Please.

9 MS. GAMBLIN: Okay.

10 So the topic -- in your order you deferred ruling on
11 topics 2, 8, 10, 13, and 20, and you asked the ILWU to tell you
12 if it would take more than 20 hours to identify the Bates
13 numbers of documents.

14 THE COURT: Right.

15 MS. GAMBLIN: Then they submitted a brief to the
16 Court saying that it would take 279. I took that to mean,
17 therefore, I guess they have a 30(b) (6) question because they
18 are not going to identify the documents for me. They have said
19 that they don't agree with my conclusions. So they are
20 refusing to bring a 30(b) (6) deponent on these topics until you
21 rule on whether they have to identify the Bates numbers.

22 Now, the other part of your order was that they
23 needed to -- well, the way I interpreted your order was that
24 they needed to research carrier communications and
25 communications with the Port Commission, and they needed to

1 represent to me that they have produced all responsive
2 documents.

3 So they sent me a letter saying they've done those
4 searches and they've produced all responsive documents. My
5 response to them was, well, if you have done the search, and
6 you now know what the universe is, can you just give me the
7 Bates number? And they said, no, we don't have a duty to do
8 so.

9 So I think they have a lot of these Bates numbers
10 kind of at their fingertips from their search terms that they
11 told me they'd done. So it doesn't seem burdensome to me that
12 they wouldn't just give me the Bates numbers.

13 One of the problems I have is that when I search for
14 documents, if I can't find anything responsive, it may very
15 well be something wrong with my system. I don't know. So if
16 they say they gave me the documents, if they could just give me
17 a few Bates numbers, give me a group of Bates number, give me
18 all the Bates numbers, and I can run and see why my searches
19 aren't working, that in of itself would be really helpful to
20 me. I may find it is my fault or my problem, or I may find
21 that in fact they have not produced all responsive documents.
22 But I can't even evaluate it without some cooperation.

23 THE COURT: And as I understand it, some of the
24 documents were produced in PFD format that is not text
25 searchable; am I right? Is that causing part of the problem?

1 MS. GAMBLIN: Yes.

2 THE COURT: So, Mr. Purcell or Ms. Karwande, I mean,
3 why don't you just give them the Bates numbers that you've
4 already gathered?

5 MR. PURCELL: Your Honor, this is just not a
6 reasonable discovery request. We produced all responsive
7 documents to Ms. Gamblin. The fact that she is purporting to
8 not be able to find them, I'm not sure what is up with that.
9 The issue with documents that don't have load files, those were
10 only a very narrow tranche of documents that were produced in
11 2014.

12 I don't know that any of these documents fall within
13 that category. The documents produced in 2018 have all
14 required meta data, and so it should be easily searchable.
15 Again, I don't know the universe of these documents and how
16 difficult it would be to provide the Bates numbers, but it
17 seems to me that this is an effort to burden the ILWU by
18 offloading what is normally in a normal case the recovery
19 responsibility of the propounding party to look through the
20 documents and identify what documents relate to what issues and
21 what they want to use at trial. And here, she is asking us to
22 break down by specific document request the responsive
23 documents. That's not the usual situation, and it is not
24 reasonable.

25 THE COURT: Well, after you receive my order --

1 MR. PURCELL: I'm happy to respond to the issue on
2 the deposition topics as well, if Your Honor wants to hear
3 that, or I can wait and talk about that later.

4 THE COURT: Later. Let me ask this --

5 MR. PURCELL: Hold on. I think Ms. Karwande may have
6 some additional light to shed on this.

7 MS. KARWANDE: Yes. This is Ms. Karwande. I
8 apologize for speaking over you.

9 I would note that the two categories of documents
10 that ICTSI raises in their response to our motion for
11 reconsideration, communications with the carriers and then
12 communications with the Port Commission, ILWU did give ICTSI
13 examples of Bates numbers of documents that we found that were
14 responsive to our searches for those categories.

15 Those Bates numbers were in the declaration of
16 Emily Maglio. They were submitted to the Court in support of
17 our motion for a protective order in ECF 336. So we have given
18 ICTSI the information requested when it was available and that
19 could have been used to double-check the searches.

20 THE COURT: Ms. Karwande, what steps did ILWU take
21 after you received my opinion and order, Docket 343, to confirm
22 that you'd produced all responsive documents?

23 MS. KARWANDE: My understanding or our interpretation
24 of the order was that it did not require us to sort of do
25 additional searches, but we confirmed, sort of based on our

1 knowledge of the searches that we had done in the past, that
2 any documents that were responsive, any communications with
3 carriers and any communications with the Port of Portland,
4 would have been produced. There is no reason, unless they were
5 privileged or something like that, that they would have been
6 withheld.

7 THE COURT: So let me ask a little more precisely.
8 What steps did you do to confirm that you really did produce
9 all responsive documents after you received my --

10 MR. PURCELL: Your Honor, sorry if I interrupted.

11 THE COURT: Sure. Go ahead.

12 MR. PURCELL: I apologize for that.

13 We went back to the document repositories that we
14 have. I wasn't involved with that. That was handled by -- I
15 wasn't personally involved with it. That was handled, in the
16 first instance, by the client and the lawyers at the Leonard
17 Carder firm, who are co-counsel. They went back to
18 correspondence files that they maintained, and they assured
19 that everything in those files had been searched and any
20 non-privileged documents had been produced. There aren't a lot
21 of places where these documents exist, I don't think, and so it
22 wasn't all that difficult, I don't think, for them to confirm
23 that.

24 THE COURT: What's this issue, from ILWU's
25 perspective, with respect to producing PDFs in a

1 non-text-searchable fashion? How many documents are we talking
2 about and when they were produced?

3 MR. PURCELL: I don't know that they are text
4 searchable, Your Honor. This was dealt with in Ms. Maglio's
5 most recent declaration, Document 348. It does, I think, allow
6 text search functions. This is paragraph 7 of Docket 348.
7 Text searches are permissible. The only thing that it limits
8 is the ability to search from to/from/CC files.

9 THE COURT: Okay.

10 MR. PURCELL: In terms of searching "PMA" or
11 searching "Port Commission," anything like that, you certainly
12 could conduct the searches, given the information that we have
13 provided.

14 To answer the rest of Your Honor's question, these
15 were our early productions at the very early stage of the case
16 in 2014, and it affected a total of 1,080 emails. And this is
17 all in Ms. Maglio's declaration.

18 THE COURT: Anything further, Ms. Gamblin, on this
19 issue?

20 MS. GAMBLIN: I think we can agree to disagree on the
21 PDF issue. In my last letters, in December and January, I have
22 repeatedly asked for PDFs to be reproduced in a searchable
23 format. I have given them the specific format that's
24 searchable for what exactly they need to produce, because I
25 thought maybe there was confusion. Anyway, nobody has ever

1 responded to that.

2 THE COURT: Mr. Purcell, what's ILWU's response to
3 the issues raised in that letter?

4 MR. PURCELL: Your Honor, again, I didn't know that
5 this issue was going to be before us, so I am not sure that I
6 have a response.

7 I think the issue -- the response would be that
8 Ms. Gamblin's complaint has always been that those files aren't
9 text searchable, and they are. It is just not correct for her
10 to say that. It is not correct for her to make a
11 representation to the Court. It is an effort to make us again
12 reproduce what they already have. It is a relatively small
13 universe, and they are perfectly capable of text searching
14 them. And again, this is only a thousand emails.

15 THE COURT: Here is what we are going to do on that:
16 I would like you to put your response in writing to this
17 December 2018 letter. Put it in writing. Send it to
18 Ms. Gamblin and copy me on it so I can see it. Take five
19 documents within the range that she is complaining about and by
20 Bates number tell her you have confirmed that they are text
21 searchable.

22 Then, Ms. Gamblin, you tell me afterwards whether
23 they are or are not. If they are not, we will figure something
24 else to do about it. But that way we will get the ILWU's
25 response in writing to that and I'd specifically just ask you

1 to find five of them within that research that Ms. Gamblin says
2 are not text searchable. Mr. Purcell you need to confirm that
3 they really are. Just pick five of them. If they are not,
4 then you have got to solve this problem. If they are, then the
5 problem is back in Ms. Gamblin's court.

6 MR. PURCELL: Thank you, Your Honor.

7 MS. GAMBLIN: Thank you, Your Honor.

8 THE COURT: Now, with respect to the jurisdictional
9 disputes, how long will it take ILWU -- it should be able to be
10 done within a week -- just list out the formal charges that
11 have been filed either with the NLRB, Section 10(k) charges, an
12 AFL-CIO Article XX complaint or a court complaint. Just
13 identify by case number and name those. ILWU is telling me
14 that's 25 to 50. Then just produce copies to ICTSI of the
15 complaint, any response, and any final judgment. If we're
16 talking about a maximum of 25 to 50, that's not that much
17 paper.

18 Is it much more than that?

19 MR. PURCELL: Again, I don't know what all is in the
20 file. But if we are limiting it to a complaint and a response
21 and a final disposition, that's three documents per complaint,
22 or somewhere in that neighborhood. We would do our best to do
23 that within a week, and we will stay in touch with Ms. Gamblin.
24 So if there is any problem there or any effect on the
25 deposition, she will be fully informed and able to take

1 whatever action she feels she needs to.

2 THE COURT: All right. That sound fine to me then.

3 I think what I'm going to do now is just simply state
4 on the record that ILWU's motion for reconsideration,
5 Docket 347, is granted in part and denied in part, as stated on
6 the record in this telephone call. If there are still further
7 problems, both sides have leave to call them to my attention as
8 you proceed as we have just discussed.

9 Now, was there something else that you all wanted to
10 discuss or that one side wanted to discuss in this telephone
11 call, because my impression, and maybe it was my mistake, it
12 was to talk about the motion for reconsideration as the parties
13 prepared for their upcoming depositions.

14 MS. GAMBLIN: Yes, Your Honor. The last issue that
15 we have to resolve is that I requested to take -- in your order
16 on the motion to compel and motion for protective order, you
17 had deferred ruling on whether I could take a 30(b)(6)
18 deposition on topics 2, 8, 10, 13, and 20 until ILWU reported
19 back to you whether it would take 20 or more hours to identify
20 the Bates numbers in the responsive documents, because if I
21 could find the world of responsive documents, I may not need to
22 cover it in a 30(b)(6) deposition.

23 The 30(b)(6) deposition is scheduled for tomorrow and
24 Thursday. They represented to the Court it would take more
25 than 20 hours. So I put the topics on my depo. exhibits, and I

1 would like to ask questions on those topics.

2 THE COURT: And ILWU's position?

3 MR. PURCELL: Your Honor, if I could respond. I
4 didn't mean to interrupt.

5 THE COURT: No. Go ahead. I was just going to ask
6 for your position.

7 MR. PURCELL: Thank you.

8 So just to back up a little bit, let me give you a
9 flavor of what these deposition topics involve and why it
10 creates a burden on ILWU.

11 Topic 2 is communications either with third parties
12 or internally among all the ILWU members about the disputed
13 work, the reefer work, or production generally at Terminal 6.

14 Similarly, topic 6 is communications either with
15 third parties or internally about the continuation or cessation
16 of ocean carrier calls, basically ocean carrier business at the
17 Port. That's a little narrower, but still extremely broad.

18 So when Your Honor reserved ruling on these, you
19 directed us to tell whether it would take more than 20 hours to
20 identify all Bates numbers of responsive documents in these
21 categories. The answer, unsurprisingly, is yes, because we are
22 talking about documents that essentially encompass the entire
23 scope of the case. If you are talking about the disputed work
24 or production at Terminal 6, that gets close to being
25 all-encompassing.

1 So, yeah, it will take us longer than 20 hours. We
2 did not understand that if we made that representation, the
3 fallback was for Ms. Gamblin to take a 30(b)(6) deposition
4 because obviously the pain and burden of producing and
5 preparing a witness is going to be just the same, if not more,
6 to the extent Ms. Gamblin is asking us to sort of have a
7 witness digest and then repeat back the entire factual record
8 of discovery in this case and every single instance where there
9 was a communication about reefers or production or about
10 carriers, that's just not possible.

11 The idea that you would have to prepare a witness on
12 that, when it has been the subject of pretty much every
13 deposition in the case already, in addition to all of the
14 document production, just does not seem reasonable to us. As I
15 said at the very start of the call, that's what I thought the
16 subject matter of today's call primarily because those were the
17 issues in Ms. Gamblin's email, and we would again renew our
18 request for a productive order on those topics.

19 THE COURT: Ms. Gamblin, I do think that Mr. Purcell
20 pretty much accurately reflects my intention on my ruling on
21 page 30, and so your response.

22 MS. GAMBLIN: Right. Okay. So if you've got your
23 ruling on page 30 out, I do as well. The way I interpreted
24 that ruling was you were going to defer ruling on whether I
25 could address these topics until you heard whether it would

1 take no more than 20 hours. It is going to take them more than
2 20 hours. So I suppose perhaps this may be the time to make
3 the ruling.

4 Do they need, despite how long it is going to take,
5 provide Bates numbers of responsive documents, or do I get to
6 address them in the 30(b) (6) deposition? One of the issues
7 that we've been having that you have heard a lot about is
8 communications with carriers and communications about the
9 carriers continuing are no longer calling on T6.

10 When we run our searches, we are not finding
11 communications with carriers that are actually from an ILWU
12 server, but it has an ILWU Bates number on it, and we're
13 confused, No. 1, why they have that document; and No. 2, you
14 know, how they're producing to us documents that they are not a
15 party to? They are not even on the email. ILWU isn't on the
16 email. Then when you look at the documents on which ILWU is
17 actually on an email and it's a communication with a carrier,
18 there are five, two of which don't have attachments.

19 So we have been inquiring. We continue to correspond
20 weekly on these things. I just learned yesterday that, well,
21 the reason is because these are all documents that the PMA gave
22 the ILWU.

23 THE COURT: All right.

24 MS. GAMBLIN: So one of the things I'm trying to
25 figure out is why don't you have any communications with the

1 carriers. That just seems illogical. And the response I get
2 is, "Well, we've given you everything, and that's all we have
3 to tell you."

4 THE COURT: All right. Here is what we are going to
5 do, and I'm going to take a middle ground on this issue. And
6 that is this: Normally in a 30(b)(6) deposition, if a
7 propounder of the request asks with painstaking specificity for
8 an answer, then there is a great deal of responsibility placed
9 on the respondent to make sure that a witness is fully prepared
10 to give a thorough, accurate, and complete answer.

11 In light of the number of hours that it will take to
12 identify some of these documents, as we have already talked
13 about and now as ILWU has explained, I am going to be quite
14 reasonable and not particularly demanding of ILWU if it turns
15 out that some of the answers to the questions placed to a
16 30(b)(6) witness is simply, "I don't know." I would not likely
17 then find that ILWU is in breach of its obligation to
18 adequately prepare a 30(b)(6) witness.

19 But that said, I am also not prepared now to take off
20 the table these topics, which means that at the upcoming
21 30(b)(6) deposition or depositions, ICTSI is allowed to ask the
22 questions that Ms. Gamblin has just identified and described
23 and that's identified in topics 2, 8, 10, 13, and 20.

24 To the extent that some of those questions may be
25 processed-related questions as opposed to substantive

1 questions, I would expect the witnesses probably will be able
2 to answer them. However, if a witness under oath and in good
3 faith responds to a question by saying, "I really don't know,"
4 then I will not likely be particularly sympathetic to a motion
5 for sanctions or contempt or anything else along those lines
6 that the witness was not adequately prepared.

7 But I am going to allow the questions to be asked.
8 The witnesses will have to answer to the best of their
9 knowledge. And as I said, where they know, they have to give
10 truthful answers in good faith. Where they don't know, they
11 are free to say, "I don't know."

12 Does that give sufficient guidance to both sides?

13 I will start with Ms. Gamblin.

14 MS. GAMBLIN: Yes, Your Honor. Thank you.

15 THE COURT: Mr. Purcell and Ms. Karwande, does that
16 give your client sufficient guidance?

17 MR. PURCELL: I think so, Your Honor. We will do our
18 best, and we will work with that guidance and get the witnesses
19 ready for depositions tomorrow and Thursday. If I could just
20 say, because I don't want this impression hanging out there,
21 there are very, very few communications between the ILWU and
22 carriers directly. That's why there aren't all that many in
23 the production. And yes, it is the case that PMA sometimes
24 forwarded its communication with its carriers onto the ILWU.
25 They were in our files, and so we have to produce anything in

1 our files, and we did so. It is not mysterious. I respect
2 that Ms. Gamblin may be puzzled and may think there should be
3 more, but there just aren't more.

4 In any event, the issue of carrier communications is
5 something that will be spoken to by the ILWU International
6 designee's primarily because that was the entity that had
7 communications to the extent they existed.

8 THE COURT: All right. Very good.

9 Obviously I don't know what the actual facts are. I
10 appreciate your comments. But as you all know and understand,
11 a federal court trial is not a trial by ambush. Everybody is
12 entitled to know what the other side knows, and so it sounds
13 like we've got a game plan going forward. I wish both sides
14 well at your upcoming depositions.

15 MR. PURCELL: Thank you.

16 MS. GAMBLIN: Thank you.

17 THE COURT: Anything else we need to talk about at
18 this time?

19 MR. PURCELL: No, Your Honor.

20 MS. GAMBLIN: No, Your Honor.

21 MS. KARWANDE: No.

22 THE COURT: Thank you. Have a good day, everybody.

23 (End of proceedings.)

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5 I certify, by signing below, that the foregoing is a
6 correct transcript of the record of proceedings in the
7 above-entitled cause. A transcript without an original
8 signature, conformed signature, or digitally signed signature
9 is not certified.

10

/s/ Dennis W. Apodaca
11 DENNIS W. APODACA, RDR, RMR, FCRR, CRR
Official Court Reporter

11/5/2020
DATE

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<p>MR. PURCELL: [18] 4/2 4/12 5/4 8/4 8/25 9/4 10/9 10/11 11/2 11/9 12/3 13/5 13/18 15/2 15/6 19/16 20/14 20/18 MS. GAMBLIN: [14] 5/9 5/19 6/6 6/8 6/14 7/25 11/19 13/6 14/13 16/21 17/23 19/13 20/15 20/19 MS. KARWANDE: [3] 9/6 9/22 20/20 THE CLERK: [1] 3/3 THE COURT: [31]</p> <p>-</p> <p>--oOo [1] 21/3</p> <p>/</p> <p>/s [1] 21/10</p> <p>1</p> <p>1,080 [1] 11/16 10 [5] 3/19 6/11 13/11 14/18 18/23 1000 [1] 2/23 12-1058-SI [1] 3/5 1211 [1] 2/8 13 [3] 6/11 14/18 18/23 15 [2] 1/6 3/1 1600 [1] 2/8</p> <p>2</p> <p>20 [10] 6/11 6/12 14/18 14/19 14/25 15/19 16/1 17/1 17/2 18/23 2008 [1] 3/21 2014 [2] 8/11 11/16 2018 [2] 8/13 12/17 2019 [2] 1/6 3/1 25 [5] 3/23 4/22 5/6 13/14 13/16 279 [1] 6/16</p> <p>3</p> <p>30 [14] 5/12 6/17 6/20 14/17 14/22 14/23 16/3 16/21 16/23 17/6 18/6 18/16 18/18 18/21 301 [1] 2/23 326-8182 [1] 2/24 336 [1] 9/17 343 [1] 9/21 347 [2] 3/11 14/5 348 [2] 11/5 11/6 3:12-cr-001058-SI [1] 1/5</p> <p>5</p> <p>50 [5] 3/23 4/22 5/6 13/14 13/16 503 [1] 2/24 5th [1] 2/8</p> <p>6</p> <p>633 [1] 2/4</p> <p>8</p> <p>8182 [1] 2/24</p> <p>9</p> <p>94111 [1] 2/4 97204 [2] 2/8 2/23</p> <p>A</p> <p>ability [1] 11/8 able [4] 8/8 13/9 13/25 19/1 about [20] 3/11 4/9 5/6 5/25 9/3 11/2 12/19 12/24 13/16 14/12 15/12 15/15 15/22 15/23 16/9 16/9 17/7 17/8 18/13 20/17 above [1] 21/7 above-entitled [1] 21/7 acceptable [2] 3/25 5/9 accurate [1] 18/10 accurately [1] 16/20 action [1] 14/1 actual [1] 20/9 actually [3] 4/5 17/11 17/17</p>	<p>addition [1] 16/13 additional [2] 9/6 9/25 address [2] 16/25 17/6 adequately [2] 18/18 19/6 affected [1] 11/16 AFL [2] 3/19 13/12 AFL-CIO [2] 3/19 13/12 after [3] 8/25 9/21 10/9 afternoon [1] 3/10 afterwards [1] 12/22 again [6] 8/15 12/4 12/11 12/14 13/19 16/17 agree [2] 6/19 11/20 ahead [2] 10/11 15/5 al [1] 3/5 all [27] all-encompassing [1] 15/25 allow [2] 11/5 19/7 allowed [1] 18/21 along [1] 19/5 already [5] 6/5 8/4 12/12 16/13 18/12 also [1] 18/19 always [1] 12/8 am [8] 3/12 5/8 6/6 7/25 12/5 18/13 18/19 19/7 Amanda [1] 2/7 ambush [1] 20/11 among [1] 15/12 another [1] 5/11 answer [7] 5/6 11/14 15/21 18/8 18/10 19/2 19/8 answers [2] 18/15 19/10 any [11] 8/12 10/2 10/2 10/3 10/19 13/15 13/15 13/24 13/24 17/25 20/4 anything [6] 7/14 11/11 11/18 19/5 19/25 20/17 Anyway [1] 11/25 Apodaca [3] 2/22 21/10 21/11 apologize [2] 9/8 10/12 appear [1] 4/22 APPEARANCES [1] 2/1 appreciate [1] 20/10 are [34] aren't [5] 7/19 10/20 12/8 19/22 20/3 arguments [1] 3/13 Article [2] 3/20 13/12 Article XX [1] 3/20 as [14] 3/18 7/23 9/2 14/5 14/7 14/8 14/12 16/14 16/23 18/12 18/13 18/25 19/9 20/10 ask [8] 4/2 4/23 9/4 10/7 12/25 15/1 15/5 18/21 asked [4] 5/2 6/11 11/22 19/7 asking [2] 8/21 16/6 asks [1] 18/7 assured [1] 10/18 attachments [1] 17/18 attention [1] 14/7 available [1] 9/18 Avenue [2] 2/8 2/23</p> <p>B</p> <p>back [6] 10/13 10/17 13/5 14/19 15/8 16/7 based [2] 5/2 9/25 basically [1] 15/16 Bates [17] 6/12 6/21 7/7 7/9 7/12 7/17 7/17 7/18 8/3 8/16 9/13 9/15 12/20 14/20 15/20 17/5 17/12 Battery [1] 2/4 be [24] because [10] 6/17 11/24 14/11 14/20 15/21 16/4 16/16 17/21 19/20 20/6 been [10] 9/19 10/4 10/5 10/19 10/20 12/8 13/11 16/12 17/7 17/19 before [5] 1/13 3/8 4/5 5/16 12/5 begin [1] 6/7 being [1] 15/24 believe [1] 4/16 below [1] 21/5 best [3] 13/22 19/8 19/18</p>
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B between [3] 3/23 4/22 19/21 bit [1] 15/8 both [3] 14/7 19/12 20/13 breach [1] 18/17 break [1] 8/22 brief [1] 6/15 briefing [1] 3/14 bring [1] 6/20 broad [1] 15/17 burden [3] 8/17 15/10 16/4 burdensome [3] 5/1 6/2 7/11 business [1] 15/16	copies [1] 13/14 copy [1] 12/18 corporation [1] 1/8 correct [4] 5/9 12/9 12/10 21/6 correctly [3] 3/24 5/25 6/6 correspond [1] 17/19 correspondence [1] 10/18 could [10] 3/13 5/7 7/16 9/19 11/12 14/17 14/21 15/3 16/25 19/19 counsel [2] 3/7 10/17 court [14] 1/1 1/14 2/22 3/3 3/7 3/20 6/16 9/16 12/11 13/5 13/12 14/24 20/11 21/11 Courthouse [1] 2/22 courts [1] 5/14 cover [1] 14/22 cr [1] 1/5 creates [1] 15/10 CRR [2] 2/22 21/11
C CA [1] 2/4 call [7] 4/18 5/11 14/6 14/7 14/11 16/15 16/16 called [1] 5/23 calling [1] 17/9 calls [1] 15/16 can [7] 4/14 5/15 7/6 7/18 9/3 11/20 12/18 can't [4] 5/17 5/18 7/14 7/22 capable [1] 12/13 Carder [1] 10/17 carrier [5] 6/24 15/16 15/16 17/17 20/4 carriers [9] 9/11 10/3 16/10 17/8 17/9 17/11 18/1 19/22 19/24 case [9] 3/5 4/25 8/18 11/15 13/13 15/23 16/8 16/13 19/23 categories [3] 9/9 9/14 15/21 category [2] 3/24 8/13 cause [1] 21/7 causing [1] 7/25 CC [1] 11/8 certain [1] 4/6 certainly [1] 11/11 certified [1] 21/9 certify [1] 21/5 cessation [1] 15/15 charge [3] 3/19 3/19 4/25 charges [3] 3/23 13/10 13/11 check [1] 9/19 CIO [2] 3/19 13/12 civil [1] 3/5 client [2] 10/16 19/16 close [1] 15/24 co [1] 10/17 co-counsel [1] 10/17 comments [1] 20/10 Commission [3] 6/25 9/12 11/11 communication [3] 16/9 17/17 19/24 communications [15] 6/24 6/25 9/11 9/12 10/2 10/3 15/11 15/14 17/8 17/11 17/25 19/21 20/4 20/7 compel [2] 4/7 14/16 complaining [1] 12/19 complaint [9] 3/20 3/20 4/25 12/8 13/12 13/12 13/15 13/20 13/21 complaints [1] 3/18 complete [1] 18/10 compromise [1] 5/4 concerned [1] 3/12 conclusions [1] 6/19 conduct [1] 11/12 conference [2] 1/11 3/5 confirm [4] 9/21 10/8 10/22 13/2 confirmed [2] 9/25 12/20 conformed [1] 21/8 confused [1] 17/13 confusion [1] 11/25 contempt [1] 19/5 continuation [1] 15/15 continue [2] 5/19 17/19 continuing [1] 17/9 cooperation [1] 7/22	D Dan [1] 4/3 Daniel [1] 2/2 data [1] 8/14 DATE [1] 21/11 day [2] 4/4 20/22 deal [2] 4/17 18/8 dealt [1] 11/4 December [2] 11/21 12/17 December 2018 [1] 12/17 declaration [3] 9/15 11/5 11/17 Defendant [2] 1/9 2/7 defer [1] 16/24 deferred [2] 6/10 14/17 demanding [1] 18/14 denied [1] 14/5 Dennis [3] 2/22 21/10 21/11 depo [1] 14/25 deponent [1] 6/20 deposition [16] 4/7 4/9 4/11 4/13 5/19 9/2 13/25 14/18 14/22 14/23 15/9 16/3 16/13 17/6 18/6 18/21 depositions [5] 5/12 14/13 18/21 19/19 20/14 described [1] 18/22 designee's [1] 20/6 despite [1] 17/4 did [8] 3/24 9/12 9/20 9/24 10/8 10/8 16/2 20/1 didn't [3] 4/5 12/4 15/4 difficult [2] 8/16 10/22 digest [1] 16/7 digitally [1] 21/8 directed [1] 15/19 directly [1] 19/22 disagree [1] 11/20 disclose [1] 6/6 discovery [2] 8/6 16/8 discuss [2] 14/10 14/10 discussed [1] 14/8 disposition [1] 13/21 dispute [4] 4/12 4/15 4/18 5/24 disputed [2] 15/12 15/23 disputes [5] 3/16 3/17 5/7 5/14 13/9 DISTRICT [4] 1/1 1/2 1/14 2/22 do [15] 5/7 7/7 9/24 10/8 12/15 12/24 13/22 13/22 14/3 16/19 16/23 17/4 17/5 18/5 19/17 Docket [4] 3/11 9/21 11/6 14/5 Docket 347 [1] 14/5 document [5] 8/22 10/13 11/5 16/14 17/13 documents [40] does [4] 11/5 16/14 19/12 19/15 doesn't [1] 7/11 don't [19] 6/19 7/7 7/15 8/3 8/9 8/12 8/15 10/21 10/22 11/3 13/19 17/18 17/25 18/16 19/3 19/10 19/11 19/20 20/9 done [5] 7/3 7/5 7/11 10/1 13/10 double [1] 9/19

D double-check [1] 9/19 down [1] 8/22 due [1] 5/15 duty [1] 7/7	five [6] 4/9 4/13 12/18 13/1 13/3 17/18 flavor [1] 15/9 foregoing [1] 21/5 formal [3] 3/18 4/21 13/10 format [3] 7/24 11/23 11/23 forward [1] 20/13 forwarded [1] 19/24 found [1] 9/13 Francisco [2] 2/4 5/13 free [1] 19/11 fully [2] 13/25 18/9 functions [1] 11/6 further [4] 4/23 6/6 11/18 14/6
E earlier [1] 3/14 early [2] 11/15 11/15 easily [1] 8/14 ECF [1] 9/17 effect [1] 13/24 effort [2] 8/17 12/11 either [3] 13/11 15/11 15/14 else [4] 12/24 14/9 19/5 20/17 email [6] 4/4 4/10 16/17 17/15 17/16 17/17 emails [2] 11/16 12/14 Emily [1] 9/16 Emily Maglio [1] 9/16 encompass [1] 15/22 encompassing [1] 15/25 end [2] 4/18 20/23 entire [2] 15/22 16/7 entitled [2] 20/12 21/7 entity [1] 20/6 essentially [1] 15/22 et [1] 3/5 evaluate [1] 7/22 even [2] 7/22 17/15 event [1] 20/4 ever [1] 11/25 every [2] 16/8 16/12 everybody [2] 20/11 20/22 everyone [1] 3/10 everything [2] 10/19 18/2 exactly [1] 11/24 examples [1] 9/13 exhibits [1] 14/25 exist [1] 10/21 existed [1] 20/7 expect [1] 19/1 explained [1] 18/13 extent [4] 5/15 16/6 18/24 20/7 extremely [1] 15/17	G Gamblin [15] 2/7 4/4 5/9 8/7 11/18 12/18 12/22 13/1 13/23 16/3 16/6 16/19 18/22 19/13 20/2 Gamblin's [3] 12/8 13/5 16/17 game [1] 20/13 gathered [1] 8/4 gave [2] 7/16 17/21 generally [1] 15/13 get [9] 3/12 3/15 5/15 5/18 6/3 12/24 17/5 18/1 19/18 gets [1] 15/24 give [12] 7/6 7/12 7/16 7/17 8/3 9/12 15/8 18/10 19/9 19/12 19/16 given [4] 9/17 11/12 11/23 18/2 go [3] 4/14 10/11 15/5 going [15] 4/23 6/18 12/5 12/15 14/3 15/5 16/5 16/24 17/1 17/4 18/4 18/5 18/13 19/7 20/13 good [5] 3/10 19/2 19/10 20/8 20/22 got [4] 6/1 13/4 16/22 20/13 granted [1] 14/5 great [1] 18/8 ground [1] 18/5 group [1] 7/17 guess [1] 6/17 guidance [3] 19/12 19/16 19/18
F fact [3] 6/4 7/21 8/7 facts [1] 20/9 factual [1] 16/7 fair [2] 4/20 5/4 faith [2] 19/3 19/10 fall [1] 8/12 fallback [1] 16/3 far [1] 5/1 fashion [1] 11/1 fault [1] 7/20 FCRR [2] 2/22 21/11 federal [1] 20/11 feels [1] 14/1 few [2] 7/17 19/21 figure [2] 12/23 17/25 file [1] 13/20 filled [1] 13/11 files [7] 8/9 10/18 10/19 11/8 12/8 19/25 20/1 final [3] 4/25 13/15 13/21 find [7] 7/14 7/20 7/20 8/8 13/1 14/21 18/17 finding [1] 17/10 fine [1] 14/2 fingertips [1] 7/10 firm [1] 10/17 first [3] 4/2 4/18 10/16 fit [1] 3/23	H had [5] 10/1 10/19 10/20 14/17 20/6 handled [3] 5/14 10/14 10/15 hanging [1] 19/20 happy [1] 9/1 has [9] 3/16 3/23 6/5 11/25 12/8 16/12 17/12 18/13 18/22 have [45] having [1] 17/7 hear [1] 9/2 heard [2] 16/25 17/7 help [1] 5/16 helpful [1] 7/19 her [3] 12/9 12/10 12/20 here [5] 3/8 4/9 8/21 12/15 18/4 Hold [1] 9/5 Honor [17] 5/5 5/10 5/20 8/5 9/2 10/10 11/4 12/4 13/6 13/7 14/14 15/3 15/18 19/14 19/17 20/19 20/20 Honor's [1] 11/14 HONORABLE [1] 1/13 hours [8] 6/12 14/19 14/25 15/19 16/1 17/1 17/2 18/11 how [5] 8/15 11/1 13/9 17/4 17/14 However [1] 19/2
	I I'd [1] 12/25 I'm [6] 5/25 8/8 9/1 14/3 17/24 18/5 ICTSI [11] 1/7 3/5 3/16 4/23 5/9 5/9 9/10 9/12 9/18 13/14 18/21 idea [1] 16/11 identified [5] 3/23 6/1 6/5 18/22 18/23 identify [9] 4/24 6/12 6/18 6/21 8/20 13/13 14/19 15/20 18/12 identifying [1] 5/24 illogical [1] 18/1 ILWU [28] ILWU's [6] 3/11 10/24 12/2 12/24 14/4 15/2

I impression [2] 14/11 19/20 Inc [2] 1/7 3/6 information [2] 9/18 11/12 informed [1] 13/25 inquiring [1] 17/19 instance [2] 10/16 16/8 instances [1] 5/6 intention [1] 16/20 internally [2] 15/12 15/15 INTERNATIONAL [3] 1/4 5/12 20/5 interpretation [1] 9/23 interpreted [2] 6/23 16/23 interrogatory [3] 4/24 5/6 5/15 interrupt [1] 15/4 interrupted [1] 10/10 involve [1] 15/9 involved [2] 10/14 10/15 is [69] isn't [4] 3/25 4/20 5/4 17/15 issue [12] 4/12 4/15 8/9 9/1 10/24 11/19 11/21 12/5 12/7 14/14 18/5 20/4 issued [1] 5/15 issues [6] 4/14 4/19 8/20 12/3 16/17 17/6 it [58] it's [1] 17/17 item [1] 5/22 its [5] 3/17 3/22 18/17 19/24 19/24 itself [1] 7/19	I load [1] 8/9 long [2] 13/9 17/4 longer [2] 16/1 17/9 LONGSHORE [1] 1/4 look [2] 8/19 17/16 looking [1] 3/20 looks [1] 4/22 lot [4] 5/16 7/9 10/20 17/7
M made [1] 16/2 Maglio [1] 9/16 Maglio's [2] 11/4 11/17 maintained [1] 10/18 make [4] 12/10 12/11 17/2 18/9 many [2] 11/1 19/22 matter [1] 16/16 maximum [1] 13/16 may [9] 7/14 7/20 7/20 9/5 14/21 17/2 18/24 20/2 20/2 Maya [1] 2/3 maybe [2] 11/25 14/11 me [22] mean [3] 6/16 8/2 15/4 means [1] 18/20 members [1] 15/12 merits [2] 3/12 3/15 meta [1] 8/14 MICHAEL [1] 1/13 middle [1] 18/5 mistake [1] 14/11 more [11] 6/12 10/7 13/18 14/19 14/24 15/19 16/5 17/1 17/1 20/3 20/3 most [1] 11/5 motion [16] 3/11 3/13 3/22 4/6 4/7 4/8 4/20 5/3 5/22 9/10 9/17 14/4 14/12 14/16 14/16 19/4 Mr. [5] 8/2 12/2 13/2 16/19 19/15 Mr. Purcell [5] 8/2 12/2 13/2 16/19 19/15 Ms [1] 9/7 Ms. [23] Ms. Gamblin [14] 4/4 5/9 8/7 11/18 12/18 12/22 13/1 13/23 16/3 16/6 16/19 18/22 19/13 20/2 Ms. Gamblin's [3] 12/8 13/5 16/17 Ms. Karwande [4] 8/2 9/5 9/20 19/15 Ms. Maglio's [2] 11/4 11/17 much [4] 13/16 13/18 16/12 16/20 my [19] 4/8 5/2 6/19 7/4 7/15 7/18 7/20 7/20 8/25 9/21 9/23 10/9 11/21 14/7 14/11 14/11 14/25 16/20 16/20 mysterious [1] 20/1	
K Karwande [6] 2/3 8/2 9/5 9/7 9/20 19/15 Keker [1] 2/3 kind [1] 7/10 know [17] 4/4 7/6 7/15 8/12 8/15 11/3 12/4 13/19 17/14 18/16 19/3 19/9 19/10 19/11 20/9 20/10 20/12 knowledge [2] 10/1 19/9 knows [1] 20/12	K Karwande [6] 2/3 8/2 9/5 9/7 9/20 19/15 Keker [1] 2/3 kind [1] 7/10 know [17] 4/4 7/6 7/15 8/12 8/15 11/3 12/4 13/19 17/14 18/16 19/3 19/9 19/10 19/11 20/9 20/10 20/12 knowledge [2] 10/1 19/9 knows [1] 20/12
L labor [1] 3/18 last [2] 11/21 14/14 later [2] 9/3 9/4 lawyers [1] 10/16 learned [1] 17/20 leave [2] 5/19 14/7 Leonard [1] 10/16 less [1] 5/1 let [4] 4/2 9/4 10/7 15/8 let's [3] 3/11 3/14 4/17 letter [3] 7/3 12/3 12/17 letters [1] 11/21 light [2] 9/6 18/11 like [8] 4/22 5/10 6/7 10/5 11/11 12/16 15/1 20/13 likely [2] 18/16 19/4 limiting [1] 13/20 limits [1] 11/7 lines [1] 19/5 list [1] 13/10 listing [1] 5/6 little [3] 10/7 15/8 15/17 LLP [1] 2/3	L name [3] 3/8 4/24 13/13 narrow [2] 3/17 8/10 narrower [1] 15/17 narrowing [1] 3/25 nature [1] 4/22 need [6] 5/14 11/24 13/2 14/21 17/4 20/17 needed [3] 6/23 6/24 6/25 needs [1] 14/1 neighborhood [1] 13/22 Nest [1] 2/3 NLRB [2] 3/18 13/11 no [9] 7/7 10/4 15/5 17/1 17/9 17/13 20/19 20/20 20/21 No. [1] 17/13 No. 2 [1] 17/13 nobody [1] 11/25 non [2] 10/20 11/1 non-privileged [1] 10/20 non-text-searchable [1] 11/1 normal [1] 8/18 normally [3] 3/12 8/18 18/6 not [34] note [1] 9/9 now [8] 6/2 6/22 7/6 13/8 14/3 14/9 18/13 18/19

N number [7] 4/25 7/7 7/17 12/20 13/13 17/12 18/11 numbers [13] 6/13 6/21 7/9 7/12 7/17 7/18 8/3 8/16 9/13 9/15 14/20 15/20 17/5	primarily [2] 16/16 20/6 privileged [2] 10/5 10/20 probably [1] 19/1 problem [5] 7/20 7/25 13/4 13/5 13/24 problems [2] 7/13 14/7 proceed [1] 14/8 proceedings [3] 1/12 20/23 21/6 processed [1] 18/25 processed-related [1] 18/25 produce [5] 6/1 10/8 11/24 13/14 19/25 produced [13] 5/16 5/24 7/1 7/4 7/21 7/24 8/6 8/10 8/13 9/22 10/4 10/20 11/2 producing [3] 10/25 16/4 17/14 production [5] 15/13 15/24 16/9 16/14 19/23 productions [1] 11/15 productive [1] 16/18 proposing [1] 4/23 propounder [1] 18/7 propounding [1] 8/19 protective [3] 4/8 9/17 14/16 provide [2] 8/16 17/5 provided [1] 11/13 Purcell [7] 2/2 4/3 8/2 12/2 13/2 16/19 19/15 purporting [1] 8/7 put [3] 12/16 12/17 14/25 puzzled [1] 20/2
O oath [1] 19/2 obligation [1] 18/17 obviously [3] 3/20 16/4 20/9 ocean [2] 15/16 15/16 off [1] 18/19 offered [1] 3/17 Official [1] 21/11 offloading [1] 8/18 Okay [5] 5/8 5/20 6/9 11/9 16/22 one [6] 4/11 4/14 7/13 14/10 17/6 17/24 only [5] 3/17 3/21 8/10 11/7 12/14 oOo [1] 21/3 open [2] 3/3 5/19 opinion [2] 6/1 9/21 opposed [1] 18/25 order [12] 4/7 4/8 6/10 6/22 6/23 8/25 9/17 9/21 9/24 14/15 14/16 16/18 OREGON [5] 1/2 1/7 1/7 1/7 3/6 original [2] 5/2 21/7 originally [1] 5/2 other [5] 4/14 4/19 5/14 6/22 20/12 our [13] 6/1 9/10 9/14 9/17 9/23 9/25 11/15 13/22 16/17 17/10 19/17 19/25 20/1 out [5] 13/10 16/23 17/25 18/15 19/20 over [2] 4/21 9/8	Q question [3] 6/17 11/14 19/3 questions [7] 15/1 18/15 18/22 18/24 18/25 19/1 19/7 quite [1] 18/13
P page [2] 16/21 16/23 pain [1] 16/4 painstaking [1] 18/7 paper [1] 13/17 paragraph [1] 11/6 part [4] 6/22 7/25 14/5 14/5 particularly [3] 6/2 18/14 19/4 parties [3] 14/12 15/11 15/15 party [2] 8/19 17/15 past [1] 10/1 PDF [1] 11/21 PDFs [2] 10/25 11/22 per [1] 13/21 perfectly [1] 12/13 perhaps [2] 5/11 17/2 permissible [1] 11/7 personally [1] 10/15 perspective [2] 3/25 10/25 Peters [1] 2/3 PFD [1] 7/24 pick [1] 13/3 placed [2] 18/8 18/15 places [1] 10/21 Plaintiff [2] 1/5 2/2 plan [1] 20/13 please [2] 3/7 6/8 PMA [3] 11/10 17/21 19/23 Port [5] 6/25 9/12 10/3 11/11 15/17 Portland [4] 1/7 2/8 2/23 10/3 position [2] 15/2 15/6 possible [1] 16/10 practice [1] 3/19 precisely [1] 10/7 prepare [2] 16/11 18/18 prepared [4] 14/13 18/9 18/19 19/6 preparing [1] 16/5 present [2] 3/7 3/21 pretty [2] 16/12 16/20 prevent [1] 5/11	R raised [2] 3/14 12/3 raises [2] 3/13 9/10 range [1] 12/19 RDR [2] 2/22 21/11 read [1] 5/2 reading [2] 5/8 5/25 ready [1] 19/19 really [5] 5/18 7/19 10/8 13/3 19/3 reason [2] 10/4 17/21 reasonable [4] 8/6 8/24 16/14 18/14 receive [1] 8/25 received [2] 9/21 10/9 recess [1] 11/5 reconsideration [10] 3/11 3/13 3/22 4/6 4/21 5/3 5/22 9/11 14/4 14/12 record [4] 14/4 14/6 16/7 21/6 recovery [1] 8/18 reefer [1] 15/13 reefers [1] 16/9 reference [1] 6/4 reflects [1] 16/20 refuse [1] 6/5 refusing [1] 6/20 relate [3] 4/5 4/14 8/20 related [4] 4/6 4/11 5/23 18/25 relatively [1] 12/12 renew [1] 16/17 repeat [1] 16/7 repeatedly [1] 11/22 reported [1] 14/18 reporter [3] 2/22 3/7 21/11 repositories [1] 10/13 represent [1] 7/1 representation [2] 12/11 16/2 represented [1] 14/24 reproduce [1] 12/12 reproduced [1] 11/22 request [6] 3/17 5/2 8/6 8/22 16/18 18/7 requested [2] 9/18 14/15 require [1] 9/24

R required [1] 8/14 research [2] 6/24 13/1 reserved [2] 4/6 15/18 resolution [1] 4/20 resolve [1] 14/15 respect [3] 10/25 13/8 20/1 respond [2] 9/1 15/3 responded [1] 12/1 respondent [1] 18/9 responds [1] 19/3 response [13] 4/25 5/15 7/5 9/10 12/2 12/6 12/7 12/16 12/25 13/15 13/20 16/21 18/1 responsibility [2] 8/19 18/8 responsive [14] 7/1 7/4 7/14 7/21 8/6 8/22 9/14 9/22 10/2 10/9 14/20 14/21 15/20 17/5 rest [1] 11/14 resulted [1] 3/18 right [10] 3/12 3/15 5/21 6/14 7/25 14/2 16/22 17/23 18/4 20/8 RMR [1] 21/11 Room [1] 2/23 rule [1] 6/21 ruling [8] 6/10 14/17 15/18 16/20 16/23 16/24 16/24 17/3 run [2] 7/18 17/10	so [31] solve [1] 13/4 some [8] 6/4 6/5 7/22 7/23 9/6 18/12 18/15 18/24 something [7] 5/7 5/23 7/15 10/5 12/23 14/9 20/5 sometimes [1] 19/23 somewhere [1] 13/22 sorry [1] 10/10 sort [3] 9/24 9/25 16/6 sound [1] 14/2 sounds [1] 20/12 speak [1] 3/8 speaking [1] 9/8 specific [2] 8/22 11/23 specifically [1] 12/25 specificity [1] 18/7 spoken [1] 20/5 stage [1] 11/15 start [2] 16/15 19/13 state [2] 3/8 14/3 stated [1] 14/5 STATES [3] 1/1 1/14 2/22 stay [1] 13/23 steps [2] 9/20 10/8 still [2] 14/6 15/17 Street [1] 2/4 subject [3] 4/10 16/12 16/16 submitted [2] 6/15 9/16 substantive [1] 18/25 such [1] 3/18 sufficient [2] 19/12 19/16 Suite [1] 2/8 support [1] 9/16 suppose [2] 5/5 17/2 sure [5] 3/8 8/8 10/11 12/5 18/9 SW [2] 2/8 2/23 sympathetic [1] 19/4 system [1] 7/15
S said [5] 6/18 7/7 16/15 18/19 19/9 same [1] 16/5 San [2] 2/4 5/13 San Francisco [1] 5/13 sanctions [1] 19/5 say [4] 7/16 12/10 19/11 19/20 saying [4] 6/2 6/16 7/3 19/3 says [1] 13/1 scheduled [2] 5/12 14/23 Schwabe [1] 2/7 scope [1] 15/23 search [5] 7/5 7/10 7/13 11/6 11/8 searchable [9] 7/25 8/14 11/1 11/4 11/22 11/24 12/9 12/21 13/2 searched [1] 10/19 searches [9] 7/4 7/18 9/14 9/19 9/25 10/1 11/7 11/12 17/10 searching [2] 11/10 11/11 searchings [1] 12/13 second [1] 5/22 Section [2] 3/19 13/11 Section 10 [2] 3/19 13/11 see [3] 3/16 7/18 12/18 seek [1] 3/17 seem [2] 7/11 16/14 seems [4] 3/22 5/25 8/17 18/1 Send [1] 12/17 sent [1] 7/3 separate [1] 4/15 server [1] 17/12 set [2] 3/4 4/5 seven [1] 4/16 share [1] 6/5 she [6] 8/7 8/21 12/19 13/25 14/1 14/1 shed [1] 9/6 should [3] 8/14 13/9 20/2 SI [2] 1/5 3/5 side [2] 14/10 20/12 sides [3] 14/7 19/12 20/13 signature [3] 21/8 21/8 21/8 signed [1] 21/8 signing [1] 21/5 Similarly [1] 15/14 SIMON [2] 1/13 3/9 simply [3] 4/24 14/3 18/16 single [1] 16/8 situation [1] 8/23 small [1] 12/12	T T6 [1] 17/9 table [1] 18/20 take [20] 5/8 6/12 6/16 9/20 12/18 13/9 13/25 14/15 14/17 14/19 14/24 15/19 16/1 16/3 17/1 17/1 17/4 18/5 18/11 18/19 talk [4] 4/9 9/3 14/12 20/17 talked [1] 18/12 talking [6] 3/10 5/5 11/1 13/16 15/22 15/23 telephone [4] 1/11 3/4 14/6 14/10 tell [5] 6/11 12/20 12/22 15/19 18/3 telling [1] 13/13 Terminal [2] 15/13 15/24 terms [2] 7/10 11/10 Terrific [1] 5/17 text [9] 7/24 11/1 11/3 11/6 11/7 12/9 12/13 12/20 13/2 than [8] 5/1 6/12 13/18 14/25 15/19 16/1 17/1 17/1 Thank [9] 4/3 5/20 13/6 13/7 15/7 19/14 20/15 20/16 20/22 that [138] that's [15] 5/1 5/7 5/9 6/2 8/23 11/23 13/14 13/16 13/21 15/17 16/10 16/15 18/2 18/23 19/22 their [5] 7/10 7/10 9/10 14/13 19/8 them [13] 4/14 7/5 8/3 8/8 10/22 11/23 12/14 13/1 13/3 14/7 17/1 17/6 19/2 then [16] 4/18 5/14 5/16 5/18 6/15 9/11 12/22 13/4 13/4 13/14 14/2 16/7 17/16 18/8 18/17 19/4 there [17] 3/7 6/4 10/4 10/20 11/25 13/24 13/24 14/6 14/9 16/8 17/18 18/8 19/20 19/21 19/22 20/2 20/3 therefore [1] 6/17 these [14] 6/20 7/9 8/12 8/15 10/21 11/14 15/9 15/18 15/20 16/25 17/20 17/21 18/12 18/20 they [52] they'd [1] 7/11 they're [2] 4/23 17/14 they've [2] 7/3 7/4 thing [1] 11/7

T things [3] 4/21 17/20 17/24 think [12] 5/23 7/9 9/5 10/21 10/22 11/5 11/20 12/7 14/3 16/19 19/17 20/2 third [3] 2/23 15/11 15/15 this [33] thorough [1] 18/10 those [14] 4/9 4/11 7/3 8/9 9/14 9/15 10/19 12/8 13/13 15/1 16/16 16/18 18/24 19/5 though [1] 5/17 thought [2] 11/25 16/15 thousand [1] 12/14 three [1] 13/21 through [2] 4/14 8/19 Thursday [2] 14/24 19/19 time [4] 3/4 4/15 17/2 20/18 to/from/CC [1] 11/8 today's [1] 16/16 together [1] 5/18 told [1] 7/11 tomorrow [2] 14/23 19/19 took [1] 6/16 topic [6] 4/15 4/16 5/13 6/10 15/11 15/14 topics [15] 4/7 4/9 4/11 4/13 6/11 6/20 9/2 14/18 14/25 15/1 15/9 16/18 16/25 18/20 18/23 total [1] 11/16 touch [1] 13/23 tranche [1] 8/10 transcript [3] 1/12 21/6 21/7 trial [3] 8/21 20/11 20/11 truthful [1] 19/10 trying [1] 17/24 turn [2] 4/18 4/21 turns [1] 18/14 two [3] 5/11 9/9 17/18	week [3] 5/11 13/10 13/23 weekly [1] 17/20 well [9] 6/23 7/5 7/15 8/25 9/2 16/23 17/20 18/2 20/14 went [2] 10/13 10/17 were [15] 4/9 4/10 7/24 8/9 8/10 9/13 9/15 9/16 10/2 10/4 11/2 11/15 16/16 16/24 19/25 weren't [1] 3/14 what [20] 4/22 5/1 7/6 8/8 8/18 8/20 8/21 9/20 10/8 11/24 12/12 12/15 13/19 14/3 15/9 16/15 18/4 20/9 20/12 what's [3] 5/24 10/24 12/2 whatever [1] 14/1 when [8] 3/13 7/13 9/18 11/2 15/18 16/12 17/10 17/16 where [4] 10/21 16/8 19/9 19/10 whether [7] 6/21 12/22 14/17 14/19 15/19 16/24 16/25 which [5] 4/5 4/9 17/16 17/18 18/20 who [1] 10/17 why [9] 3/25 4/20 5/4 7/18 8/3 15/9 17/13 17/25 19/22 will [16] 4/18 5/14 12/23 12/24 13/9 13/23 13/25 16/1 18/11 19/1 19/4 19/8 19/13 19/17 19/18 20/5 Williamson [1] 2/7 wish [1] 20/13 withheld [1] 10/6 within [6] 3/23 8/12 12/19 13/1 13/10 13/23 without [2] 7/22 21/7 witness [8] 16/5 16/7 16/11 18/9 18/16 18/18 19/2 19/6 witnesses [3] 19/1 19/8 19/18 work [4] 15/13 15/13 15/23 19/18 working [1] 7/19 world [1] 14/21 would [23] wouldn't [1] 7/12 writing [3] 12/16 12/17 12/25 wrong [1] 7/15 Wyatt [1] 2/7
U under [1] 19/2 understand [4] 3/24 7/23 16/2 20/10 understanding [3] 4/8 6/6 9/23 unfair [1] 3/18 UNION [1] 1/4 UNITED [3] 1/1 1/14 2/22 universe [3] 7/6 8/15 12/13 unless [1] 10/4 unsurprisingly [1] 15/21 until [3] 6/20 14/18 16/25 up [3] 4/5 8/8 15/8 upcoming [3] 14/13 18/20 20/14 upon [1] 5/2 us [10] 5/16 8/21 9/24 12/5 12/11 15/19 16/1 16/6 16/14 17/14 use [1] 8/21 used [1] 9/19 usual [1] 8/23	X XX [2] 3/20 13/12
V Van [1] 2/3 versus [1] 3/5 very [7] 7/14 8/10 11/15 16/15 19/21 19/21 20/8	Y yeah [1] 16/1 yes [7] 5/10 8/1 9/7 14/14 15/21 19/14 19/23 yesterday [2] 4/4 17/20 you [52] you'd [1] 9/22 you'll [1] 5/18 you've [3] 5/23 8/3 16/22 your [31] Your Honor [11] 5/5 5/10 8/5 9/2 10/10 11/4 12/4 14/14 15/3 15/18 19/17 Your Honor's [1] 11/14
W wait [1] 9/3 want [2] 8/21 19/20 wanted [2] 14/9 14/10 wants [1] 9/2 WAREHOUSE [1] 1/4 was [25] wasn't [3] 10/14 10/15 10/22 way [3] 6/23 12/24 16/23 we [42] we're [2] 13/15 17/12 we've [3] 17/7 18/2 20/13	